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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JACK DUCKWORTH,
Superintendent, Indiana State Prison
Petitioner,

-VS-

DIRK WEBSTER
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Supreme Court of Indiana wherein it reversed the conviction of Respondent and remanded the cause to the trial court for retrial, violated the Double Jeopardy clause of the Fifth Amendment.

2. Whether the decision of the United States Court of Appeals for the Seventh Circuit is erroneous for reason that it abrogates the express legal holdings and factual findings as set forth in the decision of the Supreme Court of Indiana, and which are supported by the record of the proceedings from the trial of Respondent.

3. Whether the decision of the United States Court of Appeals for the Seventh Circuit is erroneous for reason that it is in conflict with the decisions of the United States Supreme Court and other Circuit Courts of Appeal; and whether different holdings appearing in the decision of the United States Court of Appeals for the Seventh Circuit are contradictory, inapposite, and in discord with each other.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Jack R. Duckworth, Superintendent, Indiana State Prison respectfully prays this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) entered in cause number 83-3096 on July 11, 1985 and Amended on September 12, 1985, which reversed the judgment of the United States District Court for the Northern District of Indiana, South Bend Division (hereafter District Court), the Seventh Circuit thereby granting relief by way of habeas corpus to a person in

custody pursuant to a conviction before an Indiana State court.

Petitioner is the Superintendent of the Indiana State Prison, Michigan City, Indiana, and is the person having custody of the Respondent. The real party in interest in this habeas corpus action is the State of Indiana, through its Attorney General.

Respondent is Dirk Webster, formerly a prisoner in the custody of Petitioner by reason of a conviction before the Lake County, Indiana Superior Court for the crimes of two (2) counts of murder, for which convictions the Respondent was sentenced to consecutive forty-five year terms on each count.

OPINIONS BELOW

The decision of the Seventh Circuit entered on July 11, 1985, is reported at 767 F.2d 1206 (7th Cir. 1985). The opinion is set out in the appendix to this petition, beginning at page A-1. A Petition for rehearing and suggestion for rehearing in banc was denied on September 11, 1985. The Order is set out in the appendix to this petition, beginning at page A-21. On September 12, 1985 the Seventh Circuit, *sua sponte*, ordered its previous decision of July 11, 1985 to be amended. The Order Amending the previous decision of July 11, 1985 is set out in the appendix to this petition, beginning at page A-22. The decision of the District Court, entered on November 1, 1983, is reported at 572 F.Supp. 1271 (N.D. Ind. 1983). The opinion is set out in the appendix to this decision beginning at page A-25.

The decision of the Supreme Court of Indiana reversing the conviction of the Respondent and remanding the cause for retrial was entered on December 30, 1980, and is reported at *Webster v. State*, 274 Ind. 668, 413 N.E.2d 898, (Ind. 1980), (hereafter *Webster I*). This opinion is set forth in the appendix to this petition beginning at page A-30.

The decision of the Supreme Court of Indiana affirming the conviction and sentence of Respondent following his

retrial was entered on December 14, 1982, and is reported at *Webster v. State*, ____ Ind. ____, 442 N.E.2d 1034, (Ind. 1982), (hereafter *Webster II*). This opinion is set out in the appendix to this petition beginning at page A-40.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 and Rule 17 of the Rules of this Court.

The decision of the Seventh Circuit denying the Petition for Rehearing was entered on September 11, 1985. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101(c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part as follows:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Nature of the Case

This petition arises from the reversal of the District Court judgment, which judgment had denied relief to the Respondent in a habeas corpus action filed by a state prisoner under 28 U.S.C. §2254.

B. Course of Proceedings

The petition for writ of habeas corpus was filed in the District Court on July 11, 1983. On July 11, 1983 the

District Court entered its order, directing the Petitioner to submit to the District Court the record of the proceedings from Respondent's state trials, and to within thrity days, show cause why the District Court should not issue a writ of habeas corpus. On August 12, 1983 the Petitioner filed its Return to Order to Show Cause. On November 2, 1983, the District Court entered its memorandum order and judgment entry, denying relief to the Respondent. Appendix, page A-25.

On November 18, 1983 the District Court granted Respondent a Certificate of Probable Cause. Thereafter briefs were filed with the Seventh Circuit, and oral argument was heard on April 23, 1985.

On July 11, 1985 the Seventh Circuit entered its order reversing the judgment of the District Court, and remanding the case to the District Court with instructions to issue a writ of habeas corpus ordering Respondent's immediate and unconditional release from custody. On July 18, 1985 the District Court entered its order, granting a writ of habeas corpus and ordering the immediate and unconditional release of Respondent.

On July 25, 1985 Petitioner filed its Petition for Rehearing And Suggestion For Rehearing In Banc. On September 11, 1985 the Seventh Circuit entered its order denying the Petition for Rehearing. Appendix, page A-21. On September 12, 1985 the Seventh Circuit, *sua sponte*, amended its previous decision of July 11, 1985. Appendix page A-22.

C. Facts Material to the Consideration of the Questions Presented

Respondent was initially convicted by jury trial. Upon direct appeal the Supreme Court of Indiana reversed the conviction and remanded the cause for retrial. Upon retrial, the jury again convicted Respondent. The second conviction was affirmed by the Supreme Court of Indiana.

The sole issue submitted to the Seventh Circuit below and to this Court is whether the Supreme Court of Indiana in *Webster I* reversed Respondent's conviction for reason of trial court error, or for the reason of insufficiency of evidence to support the conviction. The answer to this question hinges completely upon the admissiblity of the previously recorded statements of Aurelius James Allen, (hereafter Allen) as presented by the State during trial.

If the previously recorded statements of Allen were admissible as substantive evidence then the essential elements of the charged crimes were proven. However, if the statements were admissible only for the purpose of impeaching Allen's in-court testimony, then the record of the proceedings at trial was void of other sufficient evidence to prove the essential elements.

Contrary to the express holdings of the Supreme Court of Indiana in *Webster I* and *Webster II*, and contrary to the decision of the District Court, the Seventh Circuit has declared that the decisions in *Webster I* and *Webster II* were actually premised upon the lack of sufficient evidence to support the conviction, and therefore remand for retrial was contrary to the Fifth Amendment.

The direct testimony of Allen during Respondent's second trial describes a "drug deal" gone sour which resulted in the murders of Betty DeBowles (hereafter DeBowles) and Robin Thomas (hereafter Thomas). Respondent, his father — O. D. Webster, Garland Hicks (hereafter Hicks), and Allen were at least four members of a group engaged in the distribution for profit of illegal drugs. On the evening of December 16, 1977 O. D. Webster directed Allen and Hicks to apprehend Thomas, who was indebted to the group as a result of failing to pay for previously supplied drugs. Allen and Hicks were directed to present Thomas to O. D. Webster to settle the matter. Allen and Hicks apprehended Thomas and a friend of Thomas' — DeBowles, and presented them to O. D. Webster. Thereafter Respondent, O. D. Webster, Hicks and

Allen placed Thomas and DeBowles in a car and drove to a secluded area where the murders were perpetrated.

During Respondent's second trial Allen described the grizzly details as follows: Thomas was taken from the car by Respondent. Thomas struggled with Respondent, so Hicks intervened and restrained Thomas. Respondent then turned and fired three shots from a revolver at DeBowles who was still in the car — one bullet striking her in the head resulting in her death. Meanwhile Thomas had broken free and was running away. Respondent and Hicks pursued Thomas. After they caught Thomas and again restrained him, Hicks found a broken glass bottle and slashed Thomas' throat while Respondent held him. Respondent then grabbed Thomas by his head and submerged his head in a nearby drainage ditch until Thomas was dead.

A review of the testimony of Allen during Respondent's first trial is essential to resolve the issues of this appeal. During the State's case in chief it called Allen as a witness. From the beginning of the direct examination of Allen it was apparent that Allen was refusing to honor his obligations pursuant to the plea agreement to testify against the Respondent. The State began a long line of inquiry regarding Allen's plea agreement and his previously recorded statements which directly implicated Respondent. Allen testified that he, along with Respondent, O. D. Webster, and Garland Hicks had been indicted for the murders of Thomas and DeBowles. Allen testified that he had entered into a plea agreement pursuant to which he was to testify against Respondent and the other perpetrators, in turn for a reduced charge of manslaughter and a sentence of six years. Allen testified that during his plea agreement hearing he remembered that the judge had instructed him that he must testify against the other defendants. Early during Allen's testimony, counsel for the Respondent, sensing that Allen might be recalcitrant, approached the bench and stated while citing "*Patterson*, (*Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1976)),

prior inconsistent statements is not only admissible for purposes of impeachment, but also (sic) substance of evidence." The defense requested that the court instruct the jury that Allen's testimony would only be admissible to measure credibility, and not for substantive purposes (R.181-182)[1].

The Court responded indicating that at the present stage of the trial the objection was premature for reason that the state was only laying a foundation (R.182).

As the examination of Allen continued, when confronted with questions concerning Respondent's implication in the murders, Allen's general mode of response was that he had no recollection of Respondent's involvement. However, through diligent proding, the State was able to elicit bits and pieces of testimony in which Allen not only recalled some details of the murders, but recalled making previous statements.

For instance Allen testified that he had a .45 caliber gun with a red handle on the evening of the crime (R.190).

Allen testified that he remembered having been shown a gun during a previous appearance in court (R.191).

Allen testified that he had pistol whipped Robin Thomas with a ".45" the night of the crime (R.197). Allen testified he remembered being in the house, (Robin Thomas' house) on the evening of the crime (R.198).

Allen further testified that he was at a service road at Cline and Chicago, (streets in Gary, Indiana) in the early morning hours of December 17, 1977 (R.207). (The morning following the date of te crime).

The State inquired if Allen remembered *stating previously* that the Respondent had fired three shots through the open passenger's door at DeBowles. Allen responded, "I couldn't see Dirk Webster." (R.208).

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[1]The record of the proceedings from Respondent's first trial is designated by "R." followed by the appropriate page number.

Allen admitted that in the context of previous testimony that *he had testified* that he had wiped the "inside and the handles," (of the car) to wipe off any fingerprints. Allen specifically testified that he remembered wiping off the handles (R.208-209). Allen stated DeBowles was present (R.209).

Allen further testified that he *remembered previously stating in court* that "Robin Thomas was floating in the water, so Harpo went in and pulled him up by the hair to make sure he was dead." (R.213).

Allen testified that Thomas was there (the scene of the crime.) (R.215). Allen specifically testified that he previously appeared in court for the bail hearing of O. D. Webster; and gave a statement; that he responded to questioning by Mr. Thiros, (prosecutor) with answers (R.221).

Allen specifically testified that he remembered giving a statement to Mr. Ed Reardon on December 1, 1978 at the Lake County jail (R.222, 223). Allen testified that he was under oath and gave answers (R.221-222). (Deposition of Allen taken December 1, 1978).

Allen further testified he recalled giving a typed statement to a Detective Shannon (Detective for Gary, Indiana Police Department) in the presence of his attorney (R.222).

Allen again testified that he "more than likely" would have had his .45 caliber gun on the evening of December 16, 1977; that he was near Cline and Chicago Avenue on the evening of the crime; that DeBowles and Thomas were present; that he pistol whipped Thomas; and that somebody told him to wipe the prints off the car (R.244-246).

Allen further testified that DeBowles and Thomas were definitely present at the scene of the crime and that Respondent and "Harpo" could have been (R.247).

Up to this point the State had queried Allen only as to his

previously made statements as recorded during Allen's guilty plea hearing.

Following this, and upon further direct examination of Allen, the State managed to elicit admissions by Allen that he did recall being in court in December of 1978, during the bail hearing of O. D. Webster and that prosecutor Thiros had questioned him on the record during that hearing; and that he further recalled testifying during his deposition previously taken by prosecutor Reardon.

Allen further affirmed making previous statements when he recalled that during his previous deposition he had stated that ne had been at Respondent's home on many occasions (R.358).

Although Allen had feigned lapses of memory concerning most details that would implicate Respondent, he had nonetheless clearly admitted recollection of making previous statements during his guilty plea hearing, his sentencing hearing, the bail hearing of O. D. Webster, and his deposition.

At this juncture at trial, a full, legal argument occurred between the State and the counsel for Respondent concerning the admissibility of the soon to be offered previously made statements of Allen.

Counsel for Respondent argued that meaningful cross-examination and confrontation were foreclosed because Allen had no recollection of his previous statements. The State responded arguing that pursuant to the holdings of the Supreme Court of Indiana in *Patterson*, *supra*, the previous statements of Allen were admissible as substantive evidence.

The State pointed out that in "95 out of 100 questions" Allen would not respond to, but that the defense's cross-examination was "general" (R.388).

The court responded expressing an opinion that the present case was distinguishable from those referred to by

the State for reason that the witness in *Patterson* "admitted that he made the prior statement." (R.389).

The State countered by arguing that the Court's interpretation was not accurate — that Allen had testified that he recalled being "examined by Mr. Thiros" at the "Petition to Let Bail," and that he did remember testifying in the "previous matter on December 5." (R.390-391). The state bolstered this argument by pointing out that Allen had responded in part, but that the defense had not cross-examined as to those responses.

The court stated that "I believe he did respond. Any time you put a question to him alone. But when you put a question involving Dirk Webster, he did not remember." (R.394).

After again expressing that the present case was distinguishable from *Patterson*, the court stated that it would defer ruling on the issue (R.395).

Following more testimony of Allen the Respondent again voiced his objection in the form of a motion to strike arguing the inability to conduct cross-exaimination of Allen (R.424-425). Again the State responded arguing its position that the impeaching evidence under the immediate circumstances was admissible as substantive evidence. The State further repeated its argument that the defense had not seized its opportunity to utilize cross-exaimination. The State cited specific incidents in which Allen was responsive, but which there was no cross-examination (R.425-431):

> "Although its buried with a bunch of 'I don't knows,' we have a few 'yeps' in there, in terms of actual testimony." (R.429)(EP)
>
> * * * *
>
> "He did remember being physically present and going through the tendering of the statement, but not remembering what the statement itself said." (R.431)

The trial court continued to procrastinate and vacillate agreeing in part to the State's argument:

> You were aware that the State of Indiana was able to jog his memory on occasion and have him remember, for example, that he had pistol-whipped Robin Thomas. He was there at Cline Avenue. That Robin Thomas and Betty DeBowles were there. But when he told you he simply didn't remember anything about either dates, you saw fit to let it go at that point. Mr. Prosecutor, do you have anything corroborating these statements of this witness in terms of implicating Dirk Webster?

(R.434).

Confusing the matter further the trial court cited what it perceived to be a distinguishing factor in the present case (R.435-436). The Court then again indicated it would not presently rule on the issue (R.436).

The next morning the Court stated that it would defer ruling on the defenses' motion to strike because it believed "it would be more proper...to wait until the State has rested..."

After it had completed all the direct testimony of Allen and immediately prior to moving for the admission of the prior statements of Allen the prosecutor approached the bench and stated "This is deciding Time" (R.450).

Again, the trial court shirked its responsibility as to ruling on the forthcoming previously recorded statements of Allen and stated: "Well, no you can proceed...We have a continuing objection." (R.451).

The State then offered into evidence Allen's previously recorded statements-the transcript of Allen's guilty plea hearing; the transcript of O. D. Webster's bail hearing, the deposition of Allen taken during trial, and a transcript of a portion of the trial of Garland Hicks (R.451-452). (State's Exhibit 18, 19, 20 and 21).

The trial court then addressed the jury informing them that the transcripts and depositions would be read to them. The Court *never* stated as to how such evidence should be digested by the jury (R.453).

The transcript of Allen's guilty plea hearing was marked as State's Exhibit No. 18, the deposition was marked as State's Exhibit No. 19, the transcript from the bail hearing of O. D. Webster was marked as State's Exhibit No. 20, a portion of the transcript of the trial of Garland Hicks was marked as State's Exhibit No. 21, and the transcript of the second half of the trial of Garland Hicks was marked as State's Exhibit No. 22 (R.452).

These exhibits were admitted into evidence and read to the jury (R.454-484).

During a bench conference which immediately followed the defense inquired of the State if it planned to rest. The State replied that it did (R.484).

Counsel for Respondent then, again requested that the Court issue a ruling limiting Allen's testimony and prior statements for impeachment purposes only (R.484-485).

The State again unequivocally responded arguing that the evidence was admissible for substantive purposes citing *Patterson* and *Stone*, (*Stone v. State*, 268 Ind. 672, 377 N.E.2d 1372 (1978) (R.486). The trial court then posed the question, "Is it admissible (substantively) even though he denied making the statement?" The State replied "Maybe we should go back on the record. My recollection of the testimony was his—." (R.486).

Counsel for Respondent interrupted the above debate between the Court and the State on this issue, and indicated that it would "rest" (R.487).

The Court in ambiguous terms related to counsel that if there was no more evidence "we will wait." "Is that agreeable to you.", apparently implying that the Court was still not willing to make the decisive ruling (R.497).

The following colloquy immediately followed:

BY THOMAS VANES, (Prosecutor):

Again, *I'm saying again it has to be given to them right now*, in view of the fact you do not intend to introduce any evidence. So, we could wait and have that as one of the final instructions.

BY JAMES FRANK, (Counsel for Respondent):

Well, Your Honor, I would urge that it would be segregated from the finals. *The law is to the effect that the instruction must be with reference to the testimony itself* (R.481).

BY THE COURT:

You want to rest for the record. You can rest.

BY THOMAS VANES:

Your Honor, the State of Indiana would rest.

BY JAMES FRANK:

At this time, the Defendant rests.

(emphasis added)

(R.487-488).

The trial court then followed by reading to the jury the subject final instruction which instructed that Allen's previously recorded statements were admissible only for the purpose of impeaching his in-court testimony.

REASONS FOR GRANTING THE WRIT

WHETHER THE RETRIAL OF RESPONDENT FOLLOWING HIS CONVICTION VIOLATED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

This Court's decision in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141 (1978) forms the cornerstone for the controversy in the instant appeal.

In *Burks* the defendant was convicted in the United States District Court of the crime of bank robbery by use of a dangerous weapon. At trial defendant's primary defense was that he suffered mental insanity at the time of commission of the crime and therefor lacked the mental capacity to formulate the "mens rea" for the crime. Defendant presented the testimony of three expert witnesses in substantiation of his argument. The prosecution responded with the testimony of two expert witnesses.

On appeal, *Burks v. United States*, 547 F.2d 968, 970 (6th Cir. 1976) the Court of Appeals held it was the burden of the prosecution to show beyond a reasonable doubt that the defendant was sane at the time of the commission of the crime. The court held that the prosecution had failed to carry its burden.

The Court of Appeals followed by remanding the case back to the District Court to decide after balancing the "equities" as required by *Bryan v. United States*, 338 U.S. 552, 70 S.Ct. 317 (1950), if the defendant should be retried. The defendant appealed arguing that because of the insufficiency of the evidence at trial as to an essential element of proof the Court of Appeals had no alternative but to order acquittal. Defendant maintained retrial would subject him to "Double Jeopardy" in violation of the Fifth Amendment.

At 98 S.Ct. 2144 this Court specifically held the issue to be that of reversal for insufficiency of the evidence.

It was clear from the record at trial that the prosecution had ample opportunity to present evidence pertaining to the sanity issue, and had in fact seized the opportunity and presented the testimony of expert witnesses and several eyewitnesses. Nowhere was it argued or noted that the prosecution had evidence which had been precluded by a court ruling. Footnote 4 appeared at the bottom at 98 S.Ct. 2144:

> There is no claim in this case that the trial court committed error by excluding prosecution evidence which, if received, would have rebutted any claim of evidentiary insufficiency.

At 98 S.Ct. 2149 this Court explained the difference between insufficiency of the evidence, and court error which negated the prosecution's "one fair opportunity" to offer evidence:

> Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Immediately following the Court characterized insufficiency of the evidence:

> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.[10] Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury.
>
> (Footnote omitted)

In other decisions this Court has made it clear that retrial following a conviction does not violate principles of double jeopardy.

In *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151 (1978), a decision entered the same day as *Burks, supra*, this Court found that a Florida Supreme Court's decision, dealing with a similar double jeopardy question, (*Sosa v. State*, 215 So. 736 (1968)) was confusing because the per curiam opinion found there to be insufficient evidence, while a concurring opinion found there to be trial court error.

Faced with a state appellate court's legal holding that could be read as either "insufficiency" or "trial court error", or a combination of both, this Court did not find the Florida court's order to be in violation of the Double Jeopardy clause. Instead this Court remanded the case to the Circuit Court with a suggestion that the issue be certified to the Florida court for clarification of its rationale.

In *Tibbs v. Florida*, 457 U.S. 31, 37, 102 S.Ct. 2211, 2216 (1983), this Court held that the Double Jeopardy clause did not preclude retrial following a reversal based on "the weight of the evidence" made in "the interest of justice."

In *Justices of Boston Municipal Court v. Lydon*, ___ U.S. ___, ___, 104 S.Ct. 1805, 1814 (1984) this Court held only an "unreserved" holding of "insufficiency" will preclude a retrial upon reversal:

> In *Burks, supra*, we recognized that an unreversed determination by a reviewing court that the evidence was legally insufficient likewise served to terminate the initial jeopardy.

Decisions emanating from other circuit courts of appeal have found consistently that following a conviction retrial is barred only where the lone issue on appeal is the sufficiency of the evidence.

In *United States v. Mandel*, 591 F.2d 1347, 1371-1372 (4th Cir. 1979) the circuit court ordered retrial where an appeal of a conviction alleged both trial court error and insufficiency of the evidence.

In *United States v. Harmon*, 632 F.2d 812 (9th Cir. 1980) the Ninth Circuit on a previous review had stated that when ignoring the consideration of evidence which had been erroneously admitted at trial, the evidence remaining was insufficient to sustain a drug conviction.

Upon second review, 632 F.2d at 814 the court amended its previous opinion and held that court error in failing to suppress evidence does not reach the sufficiency question or allow the prosecution a fair opportunity to present all of its evidence:

> The holding necessarily implied by this modificaton is that the Double Jeopardy Clause does not bar retrial when reversal is based on the improper admission of evidence.
>
> The reasoning underlying the Supreme Court's decision in *Burks* supports this result. Reversal for evidentiary insufficiency constitutes a decision that the government failed to prove the guilt of the accused. Reversal for failure to suppress evidence involves only a determination that the trial process was defective in a material respect, and implies nothing as to the sufficiency of the evidence of guilt of the defendant.

In *United States v. Fiore*, 443 F.2d 112, 116 (2nd Cir. 1971) the Second Circuit dealt with a similiar set of facts wherein on appeal following a conviction the testimony of a state's witness was determined to be inadmissable. The defendant argued that his retrial would be a violation of double jeopardy:

The Second Circuit disagreed:

> Furthermore, no one can be sure that Bennett's attitude at a second trial will be the same as at the first. The record does not disclose the length of his New York sentence; as he approaches the end of it or if he is now or soon becomes eligible for parole, the prospect of a federal sentence for contempt may have a more chastening effect.

"Jury confusion" has also been deemed proper justification for reversing a conviction and remanding the cause for retrial. *United States v. Coward*, 669 F.2d 180, 183 (4th Cir. 1982).

The case of *Tapp v. Lucas*, 658 F.2d 383 (5th Cir. 1981) follows much of the same scenerio as *Greene, supra*. In *Tapp* the defendant was convicted in Mississippi of the murder of his son based largely upon the testimony of his then wife, the mother of the victim.

Upon direct appeal of the conviction to the Mississippi Supreme Court, (*Tapp v. State*, 347 So.2d 974, 977 (Miss.

1977) the court held that in accordance with Mississippi law the wife's testimony was inadmissible and incompetent.

Tapp was retried and convicted this time by the use of the testimony of his ex-wife. (Subsequent to the date of the first trial Tapp's wife had obtained a divorce.) Tapp appealed the second conviction, (*Tapp v. State*, 373 So.2d 1029 (Miss. 1979)) arguing that the second trial resulted in a double jeopardy violation because his conviction was initially reversed by the Mississippi Supreme Court for the reason of insufficiency of evidence. Upon second appeal, at 373 So.2d 1031 the Mississippi Court held that despite its language on first appeal, the first conviction was reversed due to trial court error.

Tapp then applied to the Federal District Court, requesting a writ of habeas corpus based upon double jeopardy which was granted. Upon appeal, the Fifth Circuit reversed and based its decision on *Burks*, *supra* and *Greene*, *supra* and held that the ultimate determining factor is the state court which made the decision:

> Following *Greene*, we also defer to the state court's characterization of its previous opinion. Because the Mississippi Supreme Court made clear that Tapp's first conviction was reversed for trial error, the issue pretermitted by *Burks* and *Greene* is not presented in this case, and Tapp's second trial was not precluded by the double jeopardy clause.

658 F.2d at 385.

One thing is crystal clear, the Supreme Court of Indiana found that the evidence as presented by the State and as reflected in the record of the proceedings from trial, would have been sufficient to justify Respondent's conviction, but for the final jury instruction:

> This case, as presented at trial, would have been sufficient, if believed by the jury, except for the limitation on the use of Allen's prior testimony. *Webster I* 413 N.E.2d at 902 (Appendix page A-30).

The Seventh Circuit while ignoring the express language in *Webster I* and *Webster II* has in a broad and sweeping analysis deduced that the Supreme Court of Indiana reversed Respondent's conviction only because the trial court withheld its ruling on the subject evidence until after both parties had rested. This is what the Seventh Circuit claims the Supreme Court of Indiana meant when the Indiana Court held that the State had been deprived of "one fair opportunity" to present all of its evidence. A literal comparison of the Seventh Circuit's paraphrasing and the actual holdings of the Supreme Court of Indiana in *Webster I* reveals glaring discrepencies.

First the Seventh Circuit interprets the Indiana court's handling of the subject jury instruction:

> The court did not specify what "other available proof" the prosecution could have offered had the ruling been made earlier, *nor did the court indicate that the trial court's instruction was erroneous.*
>
> (Emphasis added). (Appendix page A-12).

The Seventh Circuit continued its interpretation:

> First, the Supreme Court of Indiana did not hold expressly in either *Webster I* or *Webster II* that the trial court erroneously excluded Allen's prior testimony. (Appendix page A-14).

The following is what the Indiana Court actually stated in its decision in *Webster I*:

> Up to that point in time the prosecution would have been warranted to a reasonable degree of *legal certainty* in believing that this evidence would come in as part of the *substantive* case against appellant Webster under the ruling in *Patterson v. State*, (1975) 263 Ind. 55, 324 N.E.2d 482, and *Stone v. State* (1978) Ind., 377 N.E.2d 1372. *Cf. Torrence v. State*, (1975) 263 Ind. 202 328 N.W.2d 214.
>
> (Emphasis added) (Appendix page A-38).

Finally the Seventh Circuit concluded that the Indiana Court had "repeatedly" and "expressly" held that its reversal was based upon a finding of insufficient evidence:

> It is clear that the Supreme Court of Indiana reversed appellant's conviction because the evidence was insufficient to sustain the verdict. The court in *Webster I* repeatedly and expressly stated just that. Indeed it limited its analysis to "one claim that the evidence presented by the State was insufficient to support a finding of guilt beyond a reasonable doubt." (Appendix page A-13).

Reconcile this with the Indiana Court's actual analysis in which it cited and applied this Court's holdings as found in *Burks, supra.*:

> The United States Supreme Court reversed this aspect of the case, holding that a second trial is precluded once a reviewing court has found the evidence legally insufficient and that the only remedy available to a reviewing court is a direction of a judgment of acquittal. The underlying rationale for this approach is that the prosecution "has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury". (Original emphasis). Id. at 2150, 2151.
>
> In the present case we cannot say that the State's case was lacking in this sense. This case, as presented at trial, would have been sufficient, if believed by the jury, except for the limitation on the use of Allen's prior testimony.
>
> (Appendix page A 37-38).

Next the Seventh Circuit cites Indiana case precedent as handed down after the date of *Webster I*:

> Third, the Supreme Court of Indiana subsequently held that, when a witness denies having made a prior statement or cannot remember having made it, the

> statement is inadmissable as substantive evidence. *Watkins v. State*,____ Ind. ____, 446 N.E.2d 949, 960 (1983); see also *Carter v. State*, ____ Ind. App. ____, ____, 412 N.E.2d 825, 828-31 (1980). In holding as it did in *Watkins*, the court did not find it necessary even to mention its holding in *Webster I*. The earlier Indiana cases relied on by the state in its argument in the trial court in support of the admissibility of Allen's prior testimony clearly are distinguishable (citing *Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975) and *Stone v. State*, 268 Ind. 672, 377 N.E.2d 1372 (1978).
>
> We conclude that the Supreme Court of Indiana did not hold that the trial court erred in excluding Allen's prior statements as substantive evidence. (Appendix page A 14-15).

The Seventh Circuit begrudgedly fails to notice, recognize, discuss and/or distinguish the clear language utilized by the Supreme Court of Indiana e.g." Up to that point in time the prosecution would have been warranted as a reasonable degree of *legal certainity* in believing that this evidence would come in as part of the *substantive case*..." Although the Seventh Circuit finds that the Petitioner had relied on antiquated Indiana cases which were all distinquishable, nowhere does the Seventh Circuit mention or respond to the opinion of the Supreme Court of Indiana in *Rose v. State*, ____ Ind. ____,, 446 N.E.2d 598 (Ind.1983), as presented to the attention of the Seventh Circuit in Petitioner's briefs.

As Petitioner indicated in their Briefs, *Rose* was decided by the Supreme Court of Indiana on March 24, 1983, post-dating any other decisions cited and relied on by the Seventh Circuit or the Respondent.

In *Rose*, the brother of the defendant had dropped the defendant off near the vicinity at which a murder subsequently occurred. The defendant had displayed a gun possessing eight bullets to his brother. The next day the

defendant called his brother and asked his brother to pick him up and take him to a bank. Upon picking up the defendant he again exhibited the gun, but with three less bullets. Defendant admitted that he might have killed someone the previous night and appeared to have blood stains on his shirt.

This information was related by the declarant, (brother) to the other individuals — one being a homicide detective.

At the defendant's trial the defendant's brother refused to testify and *disavowed making any previous statements.*

On review the Indiana Supreme Court held:

> The trial court permitted Captain Haynes and Sergeant Hoke to impeach Jon Rose regarding the statements he made to them. Appellant now contends that the testimonies of these two witnesses were hearsay and therefore inadmissible. This Court has held:
>
> > In the Case before us, the use of the statements made by [Codefendant] James is justified for the purpose of impeaching James. James was in court, on the witness stand and under oath. The State brought forth the text of his statements only after he testified in a manner inconsistent with them, and therefore they were admissible in evidence under the Patterson rule as originally conceived. They were not therefore inadmissible as hearsay nor did their admission deny appellant the right of confrontation." *Stone v. State*, (1978) 268 Ind. 672, 377 N.E.2d 1372; see also: *Balfour v. State*, (1981) Ind., 427 N.E. 2d 1091; *Patterson v. State*, (1975) 263 Ind. 55, 324 N.E.2d 482. The instant trial court faced the same situation as that faced by the Stone trial court. We find the trial judge in Appellant's case to be correct for the reasons stated in *Stone*. The trial court acted properly in regard to this issue.

Rose v. State, 446 N.E.2d at 601.

The above holding succinctly provides that a prosecutor

in the face of a turncoat witness and the loss of important evidence may introduce the witness' prior statements as substantive evidence if the declarant is on the witness stand.

In its brief to the Seventh Circuit the Petitioner pointed out other Indiana cases, which also provoked no comment by the Seventh Circuit. In *Montgomery v. State*, ____ Ind. App. ____, ____, 439 N.E.2d 646, 648 (1982) the Indiana Court of Appeals dealt with the recalcitrant witness issue:

> In *Patterson v. State* (1975), 263 Ind. 55, 324 N.E.2d 482 our Supreme Court adopted the rule that out-of-court assertions were admissible as substantive evidence where the out-of-court asserter was present at trial as a witness and subject to cross examination.[1] Subsequent decisions have applied the rule whether or not the witness denied the statement or denied recollection of the out-of-court statement (citations omitted). (footnote omitted)

Also going unmentioned was the case of *Gutierrez v. State*, ____ Ind ____, 386 N.E.2d 1207, 1210 (Ind 1979) in which the Surpreme Court of Indiana dealt with the admissability of prior, recorded statements of a witness:

> The next assignment of error relates to the admission of co-defendant McCall's out-of-court statement set out in Issue I *supra*. McCall testified that he did not recall making the prior inconsistent statement.
>
> * * *
>
> On appeal, appellant concedes that McCall's earlier statement was admissible under *Patterson v. State* (1979), 263 Ind. 55, 324 N.E.2d 482, but contends that the statement should not have been admitted as substantive evidence. This contention is in error. Where, as here, the out-of-court declarant is present in court, it cannot be said that the truthfulness of the out-of-court assertions rests upon the credibility of

> someone not then present and subject to cross-examination. *Id.* at 263 Ind. 58, 324 N.E.2d 484. Thus, one of the primary reasons for the application of the old hearsay exclusionary rule is missing: the unsusceptibility of the evidence to cross-examination. *Fleurallen v. State* (177), Ind., 368 N.E.2d 239, 241.

(See also, *Arch v. State*, ___ Ind. ___, ___, 381 N.E.2d 465, 468 (Ind. 1978); *Moten v. State*, ___ Ind. ___, ___, 380 N.E.2d 544, 546 (Ind. 1978) in accord).

Neither a reveiw of the actual holding in *Webster I* and *Webster II*, or former and subsequent Indiana case law on the issue, supports the Seventh Circuit's finding that the previously recorded statements of Allen could only be admissable for impeachment purposes.

On September 12, 1985 the Seventh Circuit amended its previous decision by deleting a portion of the decision that was patently contrary and in discord with this Court's decision in *Burks*, *supra*, and the decisions of all other circuit courts reporting on the issue. Within the Amendment the Seventh Circuit poses two hypothetical cases. The first is where the evidence submitted by the prosecution at trial, which results in a conviction, is upon appellate review determined to be legally inadmissiable. The Seventh Circuit concludes retrial would not be barred.

The second hypothetical is the case where the prosecution presents crucial evidence which the trial judge erroneously excludes from consideration by the jury, but the jury nevertheless convicts based upon the excluded evidence. Here, the Seventh Circuit states that reversal and retrial would "not necessarily" be barred. These holdings comport with this Court's rulings in *Burks*, *supra.*, and furthermore the second hypothetical exactly represents the facts in the instant appeal.

Although the amending language appears to be a fair interpretation of the Double Jeopardy clause, the remaining sections of the decision are rampant with contrary and inconsistent results.

For instance the following language remains:

> The state argues that the evidence was insufficient because the trial court erroneously excluded prosecution evidence. The state therefore contends that appellant's conviction was reversed for trial error rather than for insufficient evidence. We believe that to state this proposition is to reject it. Clearly, appellant did not seek, nor could he have obtained, reversal of his conviction on the ground that the court excluded prosecution evidence. There can be no doubt that appellant's conviction was reversed for insufficient evidence and for no other reason. (Appendix page A 13-14).

All of the following, conflicting, passages are found in the decision of the Seventh Circuit:

> In such a situation we hold that, regardless of whether a trial court commits error that results in prejudice only to the prosecution, if the conviction is reversed for insufficient evidence the reviewing court is barred by the double jeopardy clause from ordering a retrial. (Appendix page A-17.)
>
> * * * *
>
> "Trial error", in the double jeopardy analysis, clearly means error that prejudices the defendant, not the state. (Appendix, page A-17.)
>
> * * * *
>
> . . . The state attempts to distinguish *Burks* by arguing that the insufficiency of the evidence in that case was not caused by trial error. The Court stated in a footnote in *Burks* that "There is no claim in this case that the trial court committed error by excluding prosecution evidence which, if received, would have rebutted any claim of evidentiary insufficiency." 437 U.S. at 5n.4. The Court did not explain in *Burks* what difference this might have made in the result. In *Sanabria v. United States*, 437 U.S. 54 (1978), however, decided the same day as *Burks*, the Court held that an erroneous

> evidentiary ruling that led to an acquittal for insufficient evidence barred on double jeopardy grounds a subsequent prosecution on the same charge. *Id.* at 68-69. The footnote in *Burks* quite plainly was intended only to distinguish the factual settings of the two cases. (Appendix page A-17).
>
> * * * *
>
> . . .*Sanabria* precludes carving an exception out of the *Burks* rule on the basis of an alleged "trial error" that results in insufficient prosecution evidence. (Appendix A-18.)

Contrary to the above holdings of the Seventh Circuit, an appellate court should be free to determine what factors might have provoked any "insufficiency" including trial error or fundamental error. If an appellant raises such an issue, the state court may review the issue in its *entire* and *complete* context. A court is not required to view such issues with blinders or tunnel vision.

Next, the fact that a cause has been reversed and remanded for retrial following a conviction as compared to a retrial following an acquittal is a crucial, distinguishing factor when applying the Double Jeopardy clause. The general rule is that an appellate reversal of a conviction may be followed by a new trial. *Tibbs, supra*, 457 U.S. at 39-42, 102 S.Ct. at 2216-2218.

The Seventh Circuit's decision lastly attempts to characterize the prosecutor during trial as condescending to the "mental thoughts" of the trial judge.

The Seventh Circuit points out that the trial court indicated without ruling that it *believed* the evidence was not admissable for substantive purposes.

Within the Amendment the Seventh Circuit states further that:

> The most the state can say is that the prosecutor thought, wrongly as things turned out, that he had

> offered sufficient evidence. The prosecutor did his best to wring substantive evidence from Allen and Allen's prior statement, but he failed. He knew through out the trial that reliance on the prior statement for this purpose was chancy. (Appendix page A-24.)

In fact the record of the proceedings reflects that the prosecutor repeatedly objected and argued as to the admissability of the subject evidence, and in fact instructed the judge after he had offered the evidence that the judge was then legally obligated to rule on the evidence at that time. (R.450). The prosecutor could do no more. Clearly, a proponet of evidence, absent a court ruling to the contrary is warranted in assuming that his evidence will be included as all other evidence-as substantive evidence. Apparently, the Seventh Circuit would require the proponent to register an objection to the silence of the trial court. As absurd as such a requirement would be, the trial record reflects that the prosecutor realizing the critical nature of the subject evidence did exactly that (R.450). Nonetheless, the trial court continued without ruling.

The Seventh Circuit's unbudging conviction that the Supreme Court of Indiana in *Webster I*, reversed Respondent's conviction solely upon a finding of insufficient evidence verges on the incredible given the facts of the case, the Indiana Court's express holdings in *Webster I* and *Webster II*, and the other case precedents of the Supreme Court of Indiana and the Indiana Court of Appeals.

The Seventh Circuit has circumvented all of this by framing the decision of the Supreme Court of Indiana as one holding that the only error committed by trial court was that it dilitated in ruling on the admissability of the subject evidence. Although there is language in *Webster I* to the affect that, this may have been an additional consideration there is more than ample justification to believe that the main concern of the Indiana Court was that the jury instruction was substantively erroneous in that it

misstated the law as it applied to the previously recorded statments of Allen.

Even construing the decisions in *Webster I* and *Webster II* in a liberal light, the most that could be said is that the decisions are ambiguous or vague.

As such it was within the authority and jurisdiction of the Seventh Circuit to certify the critical issue, and direct it to the Supreme Court of Indiana for response and clarification. *Greene, supra*, 437 U.S. at 27, 98, S.Ct. at 2155, *Tapp vs. Lucas, supra*, 658 F.2d at 385.

The *Indiana Rules of Appellate Procedure* would accomodate such a "certificaton"[2].

A concise review of the decisions of Supreme Court of Indiana in *Webster I* and *Webster II* evinces that the Indiana Court was fully cognizant of this Court's holdings and tenets as found in *Burks, supra*. The Indiana Court stated that if at trial a directed verdict of acquittal was appropriate because the prosecution had failed to muster sufficient evidence, then on appeal the reviewing court could do no more than reverse and order acquittal. The Indiana Court also stated that when the previously recorded statements of Allen were excluded, insufficient evidence remained to sustain the jury's conviction.

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[2]Indiana Appellate Rule 15 (O) sets forth:

Certification of questions of state law from federal courts. When it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law which certificate the Supreme Court of this state, by written opinion, may answer. [As amended November 14, 1972, effective November 15, 1972; amended November 24, 1975, effective January 31, 1976; as amended April 27, 1976.]

Therefore, being fully appraised of these principles the Indiana Court's reversal could have only been premised upon a finding that the trial court's jury instruction was substantively erroneous and a misstatement of law.

The Indiana Court in *Webster I* only intended to rectify a technical error-that the jury in theory had been erroneously precluded from considering all of the evidence as submitted by the State. The Indiana Court was only concerned with the jury's obvious failure to abide by the trial court's instruction, even though the instruction was erroneous. The decision and order in *Webster I* remanded the cause for retrial in order to cleanse the record and afford the State one fair opportunity to submit as substantive evidence to the jury, the previously recorded statements of Allen.

The Indiana Court's efforts to assure that Respondent received a technically, error free trial did not violate the Double Jeopardy clause of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a writ of certiorari be granted.

Respectfully submitted.

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APPENDIX

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Appendix

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IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 83-3096

DIRK WEBSTER,

Petitioner-Appellant,

v.

JACK R. DUCKWORTH, Warden and
the INDIANA ATTORNEY GENERAL,

Respondents-Appellees.

**Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division
No. 83-C-306-Allen Sharp, *Chief District Judge.***

ARGUED APRIL 23, 1985—DECIDED JULY 11, 1985

Before CUMMINGS, *Chief Judge*, CUDAHY, *Circuit Judge*, and TIMBERS, *Senior Circuit Judge.**

TIMBERS, *Circuit Judge*. The question presented by this appeal from a judgment denying a state prisoner's petition for a writ of habeas corpus is whether, following the highest

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* The Honorable William H. Timbers, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

state court's reversal of the prisoner's first degree murder conviction on the ground of the insufficiency of the evidence, the double jeopardy clause of the Fifth Amendment to the United States Constitution barred retrial of the prisoner on the same charges. We hold, on the authority of *Burks v. United States*, 437 U.S. 1 (1978), that the double jeopardy clause did bar retrial.

Dirk Webster appeals from a judgment entered November 1, 1983[1] in the Northern District of Indiana, Allen Sharp, *Chief District Judge*, denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (1982). Appellant was convicted on two counts of first degree murder in the Superior Court of Lake County, Indiana, and was sentenced to two consecutive 45 year terms of imprisonment. The Supreme Court of Indiana reversed and ordered a retrial, one justice dissenting with respect to ordering a new trial. *Webster v. State*, 274 Ind. 668, 673, 413 N.E.2d 898, 902 (1980) (*Webster I*). Appellant again was convicted and again was sentenced to two consecutive 45 year terms of imprisonment. The Supreme Court of Indiana, one justice dissenting, affirmed appellant's second conviction. ___ Ind. ___, 442 N.E.2d 1034 (1982) (*Webster II*). He currently is serving his sentence.

Appellant argues that, since the Supreme Court of Indiana reversed his first conviction on the ground of the insufficiency of the evidence, under the United States Supreme Court's holding in *Burks*, *supra*, the double

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[1] We do not view lightly the elapse of eighteen months between the date of entry of judgment in the district court (November 1, 1983) and the date the appeal was argued in our Court (April 23, 1985). The delay in large measure was caused by repeated extensions granted to appellant of the time within which to file his brief, during the period he was acting pro se. We do note one redeeming aspect of the delay in getting the case to us for decision: once counsel appointed by our Court, Jerold S. Solovy, Esq. and J. Kevin McAll, Esq., appeared to represent appellant on appeal, he had the benefit of professional services of the highest order in the preparation of his briefs and the argument of his appeal.

jeopardy clause of the Fifth Amendment barred retrial and the conviction resulting from the retrial was a nullity. The district court held that appellant's first conviction was reversed because of trial error, rather than insufficient evidence, and that *Burks* did not bar retrial.

For the reasons stated below, we reverse the judgment of the district court and remand the case to that court with instructions to issue the writ of habeas corpus.

I.

We summarize those facts and Indiana state court proceedings believed necessary to an understanding of the legal issues raised on appeal.

(A) First Trial

Betty DeBowles and Robin Thomas were last seen alive on December 16, 1977. Betty's body was found two days later, slumped in the front seat of Robin's car which was parked in a secluded area. Betty had been shot once in the head. Two additional spent bullets were recovered from the car. Robin's body was not discovered until April 9, 1978 when a passer-by saw his body lying in a drainage ditch. Although the body had lacerations on the chest and throat, it was later determined that Robin died from drowning or exposure. A .32 caliber revolver was found near Robin's body. A short time after the discovery of Robin's body, the police arrested appellant Dirk Webster, Garland Hicks, Aurelius James Allen and O.D. Webster, the latter being appellant's father. The four men were indicted for the two murders.

Pursuant to a written plea agreement, Allen agreed to testify against Hicks and to plead guilty to two counts of involuntary manslaughter and one count of robbery. He was sentenced to three concurrent six-year terms of imprisonment. A second robbery count was dismissed. Allen testified that he was told by the judge at his plea hearing that he also was expected to testify against appellant and O.D. Webster, to which he agreed.

Appellant's first trial commenced before a jury on March 26, 1979 in the Superior Court of Lake County, Indiana. On the first day of trial, the state called Betty's mother. She testified regarding the last time she saw her daughter alive and identified a photograph of her daughter. The photograph was admitted in evidence. The state's second witness was a sergeant in the Gary, Indiana, police department. He testified as to what he saw when he arrived at the scene of the murder on December 18, 1977. He authenticated a photograph of Betty's body as it was found by the police. This photograph also was admitted in evidence, as were other photographs of the body and the surroundings. The sergeant testified that he found two spent bullets in the car, in addition to the bullet that remained in Betty's body, but that no gun was found.

The state next called the Chief Investigator of the Lake County coroner's office. He authenticated a photograph of Robin's body as it was found on April 9, 1978. He testified about the condition of Robin's body, stating that, although it was partially decomposed, lacerations on the chest and neck were discernible.

Also on the first day of trial, the state produced the passer-by who discovered Robin's body and the .32 caliber revolver which was found nearby. Another Gary police officer testified that the revolver had two spent and four live rounds in the cylinder. The revolver was admitted in evidence. Robin's father testified regarding his identification of his son's body and as to specific items of jewelry that were missing when the body was found.

The state then called to the stand Aurelius James Allen, one of the appellant's co-defendants who had pleaded guilty to lesser offenses. Allen answered the questions put to him by the prosecutor regarding his name and address; the fact of his incarceration; his indictment for the murders of Betty and Robin; his guilty plea; and his agreement to testify against appellant, Hicks and O.D. Webster in return

for a relatively light sentence. The prosecutor showed Allen a handwritten unsigned letter which Allen identified as one he received while in prison the previous summer. The letter, which later was admitted in evidence, stated:

"Hey Rap,

> I read of your unfortunate situation so I had to write an [sic] see if you're still cool. We both know what happended to pee-wee so don't let these honkies make a snitch out of you. Vette's life was spared because we was cool but harpo felt different. Also let me remind you of this, The pigs figure you & Vette were up on this from jump so if you decide to flip the weight can be shifted once again. If you try an [sic] jam us, you'll only jam yourself or '*Vette*' an [sic] that's your main concern isn't it?" (emphasis in original)

The prosecutor asked Allen if he could identify the handwriting on the letter or the envelope. Allen said he could not. The prosecutor questioned Allen regarding prior statements in which Allen identified the handwriting as that of Dirk Webster. Allen responded that he did not recall making the statements.

The prosecutor then questioned Allen regarding his relationships with appellant, Robin and Yvette Thomas. The latter was known as "Vette", and was Robin's sister-in-law. Allen testified that he knew both appellant and Robin, but answered "I don't know" or "I don't remember" to every other question. He testified that he did not recall ever having given any other answers to the same questions at an earlier time.

Allen was shown a copy of his plea agreement and was asked if he recognized it. He said he did. He was asked if he recalled testifying against Garland Hicks. He said "Yes". He was asked if he recalled being told by the judge at his plea hearing that he also was expected to testify against the two Websters as part of the plea bargain. He said that he did not remember.

At that point, the jury was excused. A conference between the court and counsel was held in chambers, on the record. Appellant's counsel objected that the witness was being intimidated by an implied threat to revoke his plea agreement, that he faced a potential contempt charge, and that he should be afforded counsel. The court decided that it would instruct Allen that, if he continued to refuse to testify, his plea agreement would be breached and he would be required to stand trial for the two murders. Also during the chambers conference the court indicated to the prosecutor that, as long as Allen said he did not remember, as opposed to refusing to testify, the prosecutor would be permitted to use Allen's prior statements for impeachment purposes.[2]

The jury returned to the courtroom. The state continued its examination of Allen. The witness was asked a long series of questions regarding his prior statements implicating appellant in the two murders. To each question, Allen answered "I don't remember". The questioning occasionally took the form of a direct question, but mostly it consisted of the prosecutor's reading questions and answers from Allen's prior testimony and then asking the witness if he recalled having been asked that question and having given that answer.

After a short time, appellant's counsel requested the court to instruct the jury to the effect that prior inconsistent statements could be used for impeachment purposes only, but not as substantive evidence. The court declined to give the instruction, stating that it was "premature at this point."

The questioning continued in the manner described for some period of time, with Allen continuing to state that he did not recalled having been asked the questions and having giving the answers read to him. The questions read

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[2] The importance of this statement and its timing will be referred to *infra* at page 15.

by the prosecutor and the answers previously given by the witness described for the jury in great detail the events that took place on the night of the murders. After the prosecutor read from the witness's testimony at his plea hearing, the prosecutor indicated that it was late in the day and stated "I hate to start this other impeachment." The court then adjourned.

On the second day of the trial, the county coroner testified regarding his autopsy findings with respect to the body of Robin. They related exclusively to the condition of the body. On cross-examination, the coroner testified that he could not state definitely the cause of death, but that, in his opinion, death was caused by either drowning or exposure. The Chief Investigator for the Lake County Prosecutor's Office was called to testify regarding a fruitless search for weapons in the vicinity where Betty's body had been found.

The state presented a booking card which contained the signature of appellant. It was admitted in evidence after being authenticated by an officer at the Lake County jail. The prosecutor called a handwriting expert employed by the Indiana State Police. He testified that he had compared Dirk Webster's signature on the booking card with the handwriting on the letter received by Allen while in prison. At that point in the trial the letter had not been admitted in evidence. He stated that, while the two samples displayed "limited similarities", he could not draw a definite conclusion because the sample on the booking card was too limited. He also testified that he found no "unlikes". A stipulation later was read to the jury stating that appellant had refused to give a handwriting exemplar for the purpose of comparing it with the handwriting on the letter.

A pathologist testified that Betty died from a gunshot wound to the head with lacerations of the brain. A ballistics expert testified that the two spent .32 caliber bullets found near Betty's body were not fired from the same gun that had caused the would to her head and that neither of the two

spent bullets was fired from the gun found near Robin's body. Another expert testified that the bullet recovered from Betty's body was too mutilated to be identified as to source.

Allen was recalled to the stand. Outside of the presence of the jury, he testified that he had conferred with counsel and that he understood the possible consequences of his refusal to testify. The jury returned to the courtroom. The questioning resumed along the same lines as the day before. Again, Allen repeatedly testified that he could not recall having been asked the earlier questions or having given the answers read to him. This line of questioning continued for a considerable time, until the prosecutor had completed reading all of Allen's prior testimony. Appellant's counsel attempted to cross-examine the witness, but he continued to respond to every question with "I don't remember". Court was adjourned for the day.

After the jury had been excused, appellant's counsel requested that all of Allen's testimony be stricken from the record on the ground that the witness's inability to remember violated appellant's Sixth Amendment right to confront the witnesses against him. A lengthy discussion ensued. The prosecutor argued that the prior testimony was permissible both for impeachment purposes and as substantive evidence. The court deferred ruling on the matter, but stated that it was inclined to exclude the evidence because appellant had been denied a meaningful cross-examination.

The third day of trial began with Allen again on the witness stand. His testimony followed the pattern of the previous two days. Appellant's counsel made a further, fruitless attempt to cross-examine the witness. The jury was excused for a lunch recess. The court heard more argument on the admissibility of Allen's previous testimony. The court again deferred ruling on the matter, again stating, however, that it was inclined to exclude the evidence.

After the lunch recess, the letter received by Allen while in prison was received in evidence over the objection of appellant. Robin's mother was recalled. She testified that her daughter-in-law, Yvette, was acquainted with Allen. At the conclusion of her testimony, a bench conference was held. The prosecutor stated to the court "This is the deciding time." The court, however, continued to defer ruling. Instead, the court permitted the state to put on more of what the court termed "impeachment material". The prosecutor then read to the jury from the authenticated transcripts of Allen's testimony at his plea hearing, O.D. Webster's bail hearing and Garland Hicks trial.

After reading substantial portions of the earlier testimony to the jury, the prosecution rested. Immediately thereafter, without putting on any evidence, the defense rested. The jury was excused. Appellant's counsel moved for a directed verdict on the ground of the insufficiency of the evidence. The prosecutor summarized the evidence against appellant as follows: that the killings were homicides, that Allen was a participant, that appellant was Allen's friend and that the letter to Allen in prison could imply that appellant was a participant. The prosecutor did not mention Allen's previous testimony. The court denied the motion for a directed verdict. The court asked counsel for appellant and the prosecutor if they had received the proposed jury instructions and whether they had any objections. No objections were made.

The jury was instructed, with no objection being interposed by either side, as follows, inter alia:

> "[T]he prosecutors were permitted to read into evidence statements that were agreed by the parties to have been made by the witness, Aurelius James Allen, prior to this trial. The statements were admitted by the Court for the limited purpose of attempting to impeach or impugn the veracity or truthfulness of that witness and for no other purpose. They may not be considered by you as evidence against the defendant,

> Dirk Webster, who was not present when the statements were made, and was denied meaningful cross examination of the witness during the course of this trial."

Appellant subsequently was convicted by the jury on two counts of first degree murder and was sentenced to two consecutive 45 year terms of imprisonment.

(B) **First Appeal *(Webster I)***

On direct appeal to the Supreme Court of Indiana, appellant raised nine issues for review. In its opinion, however, the court addressed only "one claim — that the evidence presented by the State was insufficient to support a finding of guilt beyond a reasonable doubt." *Webster I*, *supra*, 274 Ind. at 669, 413 N.E.2d at 899. After reviewing the evidence adduced at trial, the court set forth the standard of review applicable on appeal as follows:

> "We have said many times in reviewing sufficiency claims that we will not usurp the jury's function of weighing the evidence and judging the credibility of witnesses. We will only examine the evidence and reasonable inferences to be made therefrom that support the verdict. If there is evidence of probative value from which the jury could conclude that the defendant was guilty beyond a reasonable doubt, we will not disturb the verdict; conversely, if there is no such evidence of probative value in the record we have not only the power and authority, but the solemn duty to set aside the verdict." 274 Ind. at 671, 413 N.E.2d at 900.

The court examined the sufficiency claim under this standard and reversed the conviction, concluding that "the substantive evidence which the jury could consider does not support a conclusion of guilt." *Id.*

In reaching this conclusion, the court held that, even if the jury found that appellant wrote the threatening letter to Allen, the letter "could do no more than raise a remote

suspicion that Webster was involved" and fell "far short of satisfying the State's burden or proving guilt beyond a reasonable doubt." 274 Ind. at 672, 413 N.E.2d at 900.

The court discussed Allen's prior testimony, describing it as having been used to impeach the witness. *Id.* The court quoted from the trial court's instruction to the jury on the subject of Allen's testimony and stated "in reviewing sufficiency claims, we must exclude from our consideration any evidence that was introduced to impeach the credibility of a witness. Such evidence is not a part of the substantive case.... *Consequently, Allen's prior testimony is not, as contended by the State, additional evidence which may be considered by this Court as supporting the verdict of guilty.*" 274 Ind. at 673, 413 N.E.2d at 901 (emphasis added).[3]

The court, with one justice dissenting,[4] held that appellant could be retried without violating the double jeopardy clause. The court distinguished *Burks v. United States*, 437 U.S. 1 (1978), holding that

> "It was the trial judge's decision to give the restrictive final instruction which in fact and in point of time rendered the prosecution's case insufficient to convict. If that ruling had been made earlier the prosecution would have had the opportunity at the trial to offer other available proof to bolster its case." 274 Ind. at 674, 413 N.E.2d at 902.

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[3] The State again attempted, in its oral argument before us, to rely on the impeachment material as substantive evidence. As indicated *infra*, p. 13, we agree with the Supreme Court of Indiana on this point.

[4] In the view of the dissenting justice,

> "the rationale behind the double jeopardy proscription is simply that, considering the resources available to the State and the grave injustice done one who is erroneously brought to trial, it behooves the State to prosecute only upon firm evidence and then to bring forth its best case or suffer the consequences." *Webster I*, *supra*, 274 Ind. at 675, 413 N.E.2d at 902 (Prentice, J., dissenting in part).

The court did not specify what "other available proof" the prosecution could have offered had the ruling been made earlier, nor did the court indicate that the trial court's instruction was erroneous. It stated only that the prosecution was warranted in believing that, ultimately, the prior testimony would be admitted as substantive evidence. *Id.*

(C) Second Trial and Appeal *(Webster II)*

At appellant's second trial, more than a year after the first, Allen was able to recall the events leading up to and including the murders of Betty and Robin. Appellant was convicted again on both counts and again was sentenced to two consecutive 45 year terms of imprisonment.

Appellant appealed again to the Supreme Court of Indiana. He raised again the double jeopardy claim and argued that the evidence still was insufficient to sustain the conviction despite Allen's testimony. The court affirmed the conviction, again with one justice dissenting. *Webster II*, *supra*. In rejecting appellant's double jeopardy claim, the court held that it had already been decided in *Webster I*, *supra*, that *Burks* was distinguishable because the state did not have "'one fair opportunity to offer whatever proof it could assemble'". ____ Ind. at ____, 442 N.E.2d at 1034-35, *quoting Burks*, *supra*, 437 U.S. at 16. The court also rejected appellant's claim that the testimony of Allen as an accomplice was not credible and that the second conviction should be reversed for insufficient evidence. ____ Ind. at ____, 442 N.E.2d at 1035.

This completes our summary of proceedings in the Indiana state courts. We turn now to proceedings in the federal courts.

II.

Appellant, acting pro se with the aid of a fellow prisoner, filed the instant petition for a writ of habeas corpus in the

Northern District of Indiana on July 11, 1983. On November 1, the district court, after reviewing the complete state court record and finding that state remedies had been exhausted, denied the writ. The court held that the second trial and conviction were not barred by the double jeopardy clause because appellant's first conviction was reversed by the Supreme Court of Indiana for trial error, rather than for insufficient evidence, and the trial court had denied the prosecution "one fair opportunity to present its evidence." *Webster v. Duckworth*, S. 83-306, slip op. at 3 (N.D. Ind. 1983). The court went on to state that "This court would be less than candid if it were to say that this is not a close call."

Our decision on this appeal turns on the answers to two questions: (A) whether the Supreme Court of Indiana reversed appellant's first conviction on the ground of the insufficiency of the evidence or for trial error; and (B) whether, under recent United States Supreme Court interpretations of the double jeopardy clause, an accused may be retried after it has been held that the substantive evidence adduced at his first trial was insufficient to sustain a verdict of guilty beyond a reasonable doubt when the trial court erroneously excluded prosecution evidence. We shall discuss these questions seriatim.

(A) Insufficiency Of The Evidence vs. Trial Error

It is clear that the Supreme Court of Indiana reversed appellant's conviction because the evidence was insufficient to sustain the verdict. The court in *Webster I* repeatedly and expressly stated just that. Indeed it limited its analysis to "one claim—that the evidence presented by the State was insufficient to support a finding of guilt beyond a reasonable doubt." *Webster i, supra*, 274 Ind. at 669, 413 N.E.2d at 899. The state argues that the evidence was insufficient because the trial court erroneously excluded prosecution evidence. The state therefore contends that appellant's conviction was reversed for trial

error rather than for insufficient evidence. We believe that to state this proposition is to reject it. Clearly, appellant did not seek, nor could he have obtained, reversal of his conviction on the ground that the court excluded *prosecution* evidence. There can be no doubt that appellant's conviction was reversed for insufficient evidence and for no other reason. We turn next to the question of whether the Supreme Court of Indiana held that the insufficiency of the evidence was caused by trial court error, either in excluding prosecution evidence or in delaying in ruling on the matter, and, if so, whether it is constitutionally permissible for a reviewing court to examine the reason for the insufficiency in ordering a retrial.

First, the Supreme Court of Indiana did not hold expressly in either *Webster I* or *Webster II* that the trial court erroneously excluded Allen's prior testimony. Moreover, if the court had believed that the instruction regarding Allen's testimony was erroneous, it is only reasonable to assume that it would have said so.

Second, the state failed to object to the instruction regarding Allen's testimony either when it was first proposed or when it was given to the jury. Under Indiana law, this constituted a waiver of any objection to the instruction. Ind. R. Cr. P. 8(b).

Third, the Supreme Court of Indiana subsequently held that, when a witness denies having made a prior statement or cannot remember having made it, the statement is inadmissible as substantive evidence. *Watkins v. State*, ___ Ind. ___, ___, 446 N.E.2d 949, 960 (1983); *see also Carter v. State*, ___ Ind. App. ___, ___, 412 N.E.2d 825, 828-31 (1980).[5] In holding as it did in *Watkins*, the court did

[5] In *Nelson v. O'Neil*, 402 U.S. 622 (1971), O'Neil had been convicted after a prior inculpatory statement was admitted against his codefendant, despite the codefendant's denial of having made the

not find it necessary even to mention its holding in *Webster I*. The earlier Indiana cases relied on by the state in its argument in the trial court in support of the admissibility of Allen's prior testimony clearly are distinguishable. In both *Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975), and *Stone v. State*, 268 Ind. 672, 377 N.E.2d 1372 (1978), the witnesses neither denied making the statements nor failed to remember making them.

We conclude that the Supreme Court of Indiana did not hold that the trial court erred in excluding Allen's prior statements as substantive evidence.

The state also argues that the Supreme Court of Indiana, in ordering a retrial in *Webster I*, held that the trial court erred in deferring a ruling on the admissibility of the Allen testimony until the close of the trial. *Webster I*, *supra*, 274 Ind. at 674, 413 N.E.2d at 902. According to the State's interpretation of that decision, the court held that the failure on the part of the trial court to rule earlier on that matter caused the state justifiably to believe that the evidence would be admitted. Under this interpretation of *Webster I*, this belief on the part of the state caused it to withhold additional evidence in its possession, thereby depriving it of a "fair" opportunity to present its best case. According to the state, this constituted "trial error". We are not persuaded by the state's reasoning.

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statement. The Supreme Court held that O'Neil's Sixth Amendment right to confront the witness against him was not violated, since the codefendant "testified at length, and favorably to the defendant, concerning the underlying acts." *Id.* at 628; *see also United States v. Baker*, 722 F.2d 343, 348 (7th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1312 (1984). In the instant case, Allen could not recall making the earlier statements nor could he recall the underlying facts. We need not decide, because it is not presented here, whether appellant's right to confrontation would have been violated if the prior testimony had been admitted. For purposes of this appeal, the only question is whether the Supreme Court of Indiana held that *exclusion* of the evidence by the trial court was error. It did not so hold.

First, the state was on notice from the first day of the trial that there was a possibility that Allen's prior testimony would not be admitted as substantive evidence. The point repeatedly was argued by counsel for both sides. Each time, the trial court indicated, without ruling, that it was included to exclude the evidence. At no time did the prosecution object on the ground that failure to rule on the matter immediately would be prejudicial to the state. Second, it is difficult to understand why the state, especially under these circumstances, would withhold any additional evidence it might have in reliance on the mere possibility that Allen's prior testimony would be admitted. Third, at appellant's second trial no substantial additional evidence beyond Allen's direct testimony[6] was introduced, despite the reasonable assumption that Allen's credibility

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[6] Allen's testimony at the second trial tended to prove the following: appellant, Allen and Hicks were employed as "runners" by O.D. Webster. Allen on several occasions delivered drugs to Robin Thomas and collected money from him after the sales were made. Robin kept a "commission" out of the proceeds, and Allen delivered the balance to O.D. Webster.

On the night of the murders, appellant, Allen and Hicks were dispatched by O.D. Webster to go to Robin's house and to bring him to the elder Webster for the purpose of settling a debt of seven or eight hundred dollars that Robin owed his supplier. When they arrived at the house, they were admitted by Vette, Robin's sister-in-law with whom Allen had a relationship. The three men seized Robin and Betty, who were in Robin's bedroom. After some discussion, Allen persuaded the others to allow Yvette to remain behind. All three men were armed.

Robin and Betty were delivered to O.D. Webster and an argument between Robin and O.D. ensued. After a while, Robin and Betty were put back in the car and driven to a secluded area. As Robin was taken from the car, he struggled with appellant. Hicks intervened, and Robin was restrained. Appellant then fired three shots at Betty. Robin struggled free and fled toward a nearby drainage ditch. He was caught by appellant and Hicks. Hick, who had lost his revolver, cut Robin with a broken bottle, and appellant held his head under the water until he was dead. The three men fled on foot and were picked up by O.D. Webster who had parked nearby.

would be sharply impeached. We fail to see how this so-called "trial error" could have prejudiced the state.

Nevertheless, because the Supreme Court of Indiana's opinion is ambiguous, we accept the state's interpretation of *Webster I* and assume that the Supreme Court of Indiana held that the delay in ruling on the evidentiary question was error prejudicial to the state. In such a situation we hold that, regardless of whether a trial court commits error that results in prejudice *only to the prosecution*, if the conviction is reversed *for insufficient evidence* the reviewing court is barred by the double jeopardy clause from ordering a retrial.

(B) Recent Supreme Court Decisions On Double Jeopardy

In *Burks* the Supreme Court held that the double jeopardy clause prohibits retrial when a conviction is reversed for insufficient evidence as opposed to "trial error". 437 U.S. at 16. "Trial error" was defined as "a determination that a defendant has been *convicted* through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct." *Id.* at 15 (emphasis added). "Trial error", in the double jeopardy analysis, clearly means error that prejudices the defendant, not the state. *Id.*; *see also Sumpter v. DeGroote*, 552 F.2d 1205, 1211-12 (7th Cir. 1977).

The state attempts to distinguish *Burks* by arguing that the insufficiency of the evidence in that case was not caused by trial error. The Court stated in a footnote in *Burks* that "There is no claim in this case that the trial court committed error by excluding prosecution evidence which, if received, would have rebutted any claim of evidentiary insufficiency." 437 U.S. at 5 n.4. The Court did not explain in *Burks* what difference this might have made in the result. In *Sanabria v. United States*, 437 U.S. 54 (1978), however, decided the same day as *Burks*, the Court held that an erroneous evidentiary ruling that led to an acquittal for insufficient evidence barred on double jeopardy

grounds a subsequent prosecution on the same charge. *Id.* at 68-69. The footnote in *Burks* quite plainly was intended only to distinguish the factual settings of the two cases.

The state attempts to distinguish *Sanabria* by arguing that the instant case involves a *conviction* and subsequent reversal, rather than an acquittal. A reversal based on the insufficiency of the evidence, however, is the constitutional equivalent of an acquittal "because it means that no rational factfinder could have voted to convict the defendant." *Tibbs v. Florida*, 457 U.S. 31, 41 (1982); *see Sampter, supra*, 552 F.2d at 1211-12. *Sanabria* precludes carving an exception out of the *Burks* rule on the basis of an alleged "trial error" that results in insufficient prosecution evidence.

Our decision today is nothing more than a reaffirmation of what has been the law at least since *Burks*. The state's reliance on cases that predate *Burks* is foreclosed by the Supreme Court's statement in that case that "A close reexamination of those precedents...persuades us that they have not properly construed the Clause, and accordingly should no longer be followed." *Burks, supra*, 437 U.S. at 12. *Burks*, as clarified by *Sanabria*, is now the law. We of course are duty-bound to follow it.

We note that there is an apparent, though not real, anomaly in the law in the following respect: if a trial court erroneously *admits* prosecution evidence, retrial is permitted because a reversal would be based on "trial error"; but where a trial court erroneously *excludes* prosecution evidence, and the conviction is reversed for insufficient evidence, retrial is barred. What appears at first blush to be an anomaly disappears upon closer examination. The rule that the state is afforded but one opportunity to convict, "lying at the core of the Clause's protections, prevents the State from honing its trial strategies and pefecting its evidence through successive attempts at conviction." *Tibbs, supra*, 457 U.S. at 41. The absence of competent substantive evidence to support a verdict of guilty beyond a reasonable doubt, whether the result of prosecutorial inability, judicial error or a

recalcitrant witness, requires an acquittal either at trial or on appeal. The Constitution prohibits giving the state a "second bite at the apple." *Burks, supra*, 437 U.S. at 17.[7]

To summarize: We hold that appellant's first conviction was reversed by the Supreme Court of Indiana because the state failed to produce evidence sufficient to sustain a verdict of guilty beyond a reasonable doubt and that the insufficiency of the evidence, whether or not caused by an erroneous trial court ruling, was the constitutional equivalent of an acquittal. Appellant's retrial and subsequent conviction, therefore, violated the double jeopardy clause of the Fifth Amendment.

We reverse the judgment of the district court and remand the case to that court with instructions to issue a writ of habeas corpus ordering Webster's immediate and unconditional release from custody.

Let the Great Writ issue.

REVERSED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[7] We are confident that this rule will not sanction the admission of prosecution evidence, where that decision might otherwise be a close one, for the purpose of permitting retrial in the event of reversal. The due process clause "sets a lower limit on an appellate court's definition of evidentiary sufficiency" and thereby restrains "the power of appellate courts to mask reversals based on legally insufficient evidence as reversals grounded on the weight of the evidence". *Tibbs, supra*, 457 U.S. at 45; *see Jackson v. Virginia*, 443 U.S. 307, 316 (1979). Similarly, due process would prohibit retrial where it becomes clear to a reviewing court, whether federal or state, on the basis of statements made by the trial court, arguments presented by the prosecution, the objective clarity of the law on the issue or otherwise, that inadmissible evidence has been admitted for the sole purpose of allowing the state to garner additional competent evidence for a retrial.

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 11, 1985.

Before

HON. WALTER J. CUMMINGS, Chief Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. WILLIAM H. TIMBERS, Senior Circuit Judge*

DIRK WEBSTER, *Petitioner-Appellant,*	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 83-C-306 Allen Sharp, Judge.
No. 83-3096 vs.	)	
JACK R. DUCKWORTH, Warden, and the INDIANA ATTORNEY GENERAL, *Respondents-Appellees.*	)	

This cause was heard on the record from the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, in accordance with the opinion of this Court filed this date.

* The Honorable William H. Timbers, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 11, 1985.

Before

HON. WALTER J. CUMMINGS, Chief Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. WILLIAM H. TIMBERS, Senior Circuit Judge*

DIRK WEBSTER, *Petitioner-Appellant,*	) Appeal from the) United States
No. 83-3096 v.	) District Court for) the Northern
JACK R. DUCKWORTH, Warden, and the INDIANA ATTORNEY GENERAL, *Respondents-Appellees.*	) District of Indiana,) South Bend) Division.) No. 83-C-306) Allen Sharp, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by respondent-appellee Jack R. Duckworth, a vote of the active members of the Court was requested, and all of the active members of the Court have voted to deny a rehearing *en banc*.** Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable William H. Timbers, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

** Circuit Judge Flaum disqualified himself from consideration of the petition.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 12, 1985.

Before

HON. WALTER J. CUMMINGS, Chief Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. WILLIAM H. TIMBERS, Senior Circuit Judge*

DIRK WEBSTER, *Petitioner-Appellant,*	) Appeal from the) United States
No. 83-3096 vs.	) District Court for the Northern
JACK R. DUCKWORTH, Warden, and the INDIANA ATTORNEY GENERAL, *Respondents-Appellees.*	) District of Indiana,) South Bend) Division.) No. 83-C-306) Allen Sharp, Judge.

ORDER

The Court, sua sponte, hereby amends its opinion filed July 11, 1985, and reported in 767 F.2d 1206, by ordering:

(1) That the following portion of the opinion is deleted (referring to pages of the slip opinion dated July 11, 1985):

(a) Beginning at page 18, line 17, through page 19, line 9.

(b) Footnote 7 on pages 18 and 19.

(2) That, in lieu of the portion of the opinion deleted as set forth in paragraph (a) above, the following new paragraphs are added:

* The Honorable William H. Timbers, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

"The fact that *Burks* rests on two lines of reasoning may present difficulties in cases other than the one before us. As the Court emphasized in *Tibbs*, the decision in *Burks* depended not only on the fact that a properly instructed jury should have voted to acquit but also on the fact that the constitutional provision 'forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it fails to muster in the first proceeding.' *Burks, supra*, 437 U.S. at 11, quoted in *Tibbs, supra*, 457 U.S. at 41. If the prosecution actually presents enough evidence to support a conviction and the jury convicts, but for some reason the evidence properly admitted is insufficient, we would have a different case.

"For example, one court of appeals has suggested that if the evidence actually admitted is sufficient, but some of the evidence should have been excluded (perhaps on hearsay or exclusionary rule grounds) and what remains is insufficient, there may be a new trial so that the prosecution may replace the inadmissible evidence with admissible evidence. *United States v. Bibbero*, 749 F.2d 581, 586 & N.3 (9th Cir. 1984); *United States v. Harmon*, 632 F.2d 812 (9th Cir. 1980). The law need not encourage the prosecution to engage in overkill in the first trial to protect the judgment from later decisions that some evidence should have been excluded. As another example, a distinctly harder one, the government may offer sufficient evidence only to have the court erroneously exclude an essential portion. In such a case a retrial would not offend the second rationale of *Burks*, the one based on the prohibition against supplying evidence the prosecution 'failed to muster' in the first trial. Although it might accurately be portrayed as a case in which the first jury ought to have acquitted on the evidence it heard, unlike *Burks* it

cannot be portrayed as a case in which the jury ought to have acquitted on all the evidence the prosecution mustered. *Sanabria* is not necessarily a complete rejection of a second trial in this limited circumstance, for as the Court reiterated in *Tibbs*, *supra*, 457 U.S. at 39-42, *Burks* is but a narrow exception to the rule that a reversal on appeal after a conviction may be followed by a new trial.

"We need not resolve these difficult cases here. The prosecution did not muster sufficient evidence only to learn belatedly that some evidence would be deemed inadmissible. No evidence was offered and excluded. The most the state can say is that the prosecutor thought, wrongly as things turned out, that he had offered sufficient evidence. The prosecutor did his best to wring substantive evidence from Allen and Allen's prior statement, but he failed. He knew throughout the trial that reliance on the prior statement for this purpose was chancy. Nothing the trial court said or did kept out any admissible evidence or lulled the prosecutor into a false sense of security.

"The prosecutor's erroneous prediction of the sufficiency of the evidence cannot distinguish this case from *Burks*. Doubtless the prosecutor in *Burks* thought he had offered enough, and surely he thought he could offer more if given another chance. Few prosecutors knowingly stop short of introducing evidence sufficient to convict. If a prosecutor's miscalculation of how much evidence is enough would permit a second trial, *Burks* would be drained of substance. We therefore conclude that the double jeopardy clause barred a second trial in this case."

(3) That in all other respects the opinion filed July 11, 1985, is reconfirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DIRK WEBSTER	)	
	)	
Petitioner	)	
	)	
v	)	No. S 83-306
	)	
JACK R. DUCKWORTH, Warden	)	
and INDIANA ATTORNEY GENERAL	)	
	)	
Respondents	)	

MEMORANDUM AND ORDER

This case is presently before the court on a petition for writ of habeas corpus, filed pursuant to 28 U.S.C. §2254. In accord with the dictates of *Townsend v. Sain*, 372 U.S. 293 (1963), the complete state court record has been filed with, and carefully examined by, this court. As per the requirements of 28 U.S.C. §2254(b) and *Anderson v. Harless*, ___ U.S. ___, 103 S. Ct. 276 (1982), the petitioner exhausted his available state court remedies prior to the filing of this application for federal habeas relief. Both sides having briefed their respective positions,[1] this action is now ripe for ruling.

The petitioner was convicted in a state court jury trial of two counts of murder, Ind. Code §35-42-1-1, and sentenced to consecutive terms of forty-five years' imprisonment on each count. On direct appeal to the Supreme Court of Indiana, the convictions were reversed and remanded for a

[1] Although petitioner is not represented by legal counsel, and has made no request of this court for appointed counsel under 28 U.S.C. §1915(d), it should be noted that the petitioner has been assisted since the inception of this matter by Richard Lee Owen II, an inmate at Indiana State Prison who has had considerable experience in prosecuting prisoner petitions in federal court.

second trial. *Webster v. State*, ___ Ind. ___, 413 N.E.2d 898 (1980) (hereafter, Webster I). Upon retrial, petitioner was again convicted on both murder counts, receiving an identical sentence of forty-five years' imprisonment on each count. On direct appeal to the Supreme Court of Indiana, the convictions were affirmed. *Webster v. State*, ___ Ind. ___, 442 N.E.2d 1034 (1982) (hereafter, Webster II).

Petitioner raises but a single issue for review: Whether he has been placed in jeopardy twice by virtue of his having been tried two times on the murder charges, thereby violating his Fifth and Fourteenth Amendment rights.

Simply put, petitioner argues that the Supreme Court of Indiana reversed his conviction for the reason that the prosecution at trial had failed to present sufficient evidence to carry its burden and that retrial is necessarily precluded.

The Fifth Amendment's Double Jeopardy guarantee protects against three things: (1) a second prosecution for the same offense after having once been acquitted thereon; (2) a second prosecution for the same offense after a conviction thereon; and, (3) successive punishments for the same offense. *Wilson v. Meyer*, 655 F.2d 118, 120 (7th Cir. 1981), *cert. denied*, 445 U.S. 993 (1982), citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Washington v. Duckworth*, 567 F. Supp. 513, 514 (N.D. Ind. 1983). This above guarantee is applicable against the States via the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969).

A particular nuance of this rule is as follows: where an underlying conviction has been vacated and reversed for insufficient evidence, the Double Jeopardy Clause of the Fifth Amendment bars further prosecution thereon. *Burks v. United States*, 437 U.S. 1 (1978); *Greene v. Massey*, 437 U.S. 19 (1978). Where, however, the vacation or reversal of a conviction was not because of insufficient evidence, but

rather because of trial court error, double jeopardy does not apply and cannot, therefore, act as a bar to a retrial on the same charges. Id.

As this court noted in *Washington v. Duckworth, supra,*

> The Supreme Court's decisions in such cases as *Sumner v. Mata*, 449 U.S. 539, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1982) [sic], and *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), leave little doubt that a state court's determinations which are spelled out by the record are to be accorded great weight by a federal court sitting in habeas review. Accordingly, and for an understanding of how the Indiana Supreme Court determined the question of petitioner's...conviction, this court turns now to the decision[s themselves].

567 F. Sup, at 514-15.

The pertinent part of the Indiana Supreme Court's decision in Webster I, supra, at 901 and 902, distinguishes between a reversal based upon insufficiency of the evidence and reversal based upon trial court error, thus presenting the prosecution with one fair opportunity to present its evidence. Because the Court's language therein is essential to a clear understanding of this petition, this court deems it necessary to quote at length therefrom:

> This case is distinguishable from *Burks*, however. In that case, the defendant's conviction for robbery following a trial in which he had raised the defense of insanity was reversed by the Sixth Circuit Court of Appeals because the government had not met its burden of proving sanity beyond a reasonable doubt. The Court of Appeals remanded the case to the district court where the defendant was to have "a directed verdict of acquittal unless the government presents sufficient evidence to carry its burden on the issue of defendant's sanity." *Id.* at 2144. The United States Supreme Court reversed this aspect of the case, holding that a second trial is precluded once a reviewing court has found the evidence legally

> insufficient and that the only remedy available to a reviewing court is a direction of a judgment of acquittal. The underlying rationale for this approach is that the prosecution "has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have been submitted to the jury." (Original emphasis.)
>
> *Id.* at 2150, 2151.
>
> In the present case we cannot say that the State's case was lacking in this sense. This case, as presented at trial, would have been sufficient, if believed by the jury, except for the limitation on the use of Allen's prior testimony. That limitation arose when the trial judge determined that he would give the final instruction restricting the jury's use of that testimony. Up to that point in time the prosecution would have been warranted to a reasonable degree of legal certainty in believing that this evidence would come in as part of the substantive case against appellant Webster under the ruling in *Patterson v. State*, (1975) 263 Ind. 55, 324 N.E.2d 482, and *Stone v. State*, (1978) Ind., 377 N.E.2d 1372. Cf. *Torrence v. State*, (1975) 263 Ind. 202, 328 N.E.2d 214. It was the trial judge's decision to give the restrictive final instruction which in fact and in point of time rendered the prosecution's case insufficient to convict. (Emphasis added.)

The Indiana Supreme Court above held that the trial court improperly instructed the jury that evidence introduced by the prosecution for purposes of impeachment could not be considered as substantive evidence in proof of the elements of the crime. (*Webster I*, R. 59).

Again, at pages 1034 and 1035 of *Webster II*, the Indiana Supreme Court, in affirming the Petitioner's convictions on retrial, stated:

> The question of whether defendant's retrial was prohibited by the double jeopardy clause has already been considered, discussed and decided adversely to defendant's claim in this case on its initial appeal. We

said there that while in the usual case a reversal for evidentiary insufficiency precludes a retrial because of double jeopardy considerations, *Burks v. United States*, (1978) 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, the *Burks* rationale does not apply in this case. *Webster, supra*, 413 N.E.2d at 902. Athough the State may not appeal from an acquittal of a defendant by the trier of fact, no matter how erroneous the foundation for that acquittal, *Fong Foo v. United States*, (1962) 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed. 629, here, a judgment of conviction was rendered by the jury in defendant's first trial. The question of whether the State had "one fair opportunity to offer whatever proof it could assemble", *Burks, supra*, 437 U.S. at 16, 98 S.Ct. at 2150, 57 L.Ed.2d at 12, may be considered when a judgment of conviction has been returned and defendant appeals, alleging evidentiary insufficiency, and attempts to avoid retrial.

The Supreme Court of Indiana has premised its opinion upon the fact that the prosecutor at the first trial, *as a result of trial court error*, was not afforded "one fair opportunity to present is evidence." Thus, the United States Court of Appeals for the Seventh Circuit noted recently, "reversal on the grounds of insufficient evidence is proper only when the prosecution's failure to sustain its burden is clear." *United States v. Jones*, 696 F.2d 479, 490 (7th Cir. 1982), citing *Burks, supra*, 437 U.S. at 16-17.

This court would be less than candid if it were to say that this is not a close call. Nevertheless, a careful examination of the court record and file, as well as the two opinions in *Webster I* and *II*, makes clear that insufficiency of the evidence was not the reason for reversing and remanding the original convictions. According, there appearing no basis for the issuance of the writ, the petition is DENIED, writ DISMISSED. SO ORDERED.

Enter November 1, 1983.

ALLEN SHARP
CHIEF JUDGE, UNITED
STATES DISTRICT COURT.

JUDGMENT IN A CIVIL CASE

United States District Court

DIRK WEBSTER,	)	Northern District
	)	of Indiana South
v.	)	Bend Division
	)	S83-0306
JACK R. DUCKWORTH and	)	Allen Sharp, Judge
INDIANA ATTORNEY GENERAL	)	
	)	

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that petitioner take nothing, that the petition for writ of habeas corpus is denied and that the writ is dismissed.

Dirk WEBSTER, Appellant,

v.

STATE of Indiana, Appellee.

No. 1079S286.

Supreme Court of Indiana.

Dec. 30, 1980.

Defendant was convicted in the Lake Superior Court, Crim. Div. 4, James L. Clement, J., of murder, and defendant appealed. The Supreme Court, DeBruler, J., held that: (1) evidence elicited from witness could not be considered in reviewing question whether evidence was

sufficient to support guilty verdict where statements were admitted by trial court for limited purpose of attempting to impeach or impugn veracity of truthfulness of the witness and for no other purpose, and (2) double jeopardy did not bar second prosecution, even though Supreme Court reversed original conviction on basis of insufficiency of evidence, where case, as presented at trial, would have been sufficient to support guilty verdict except for limitation on use of witness' prior testimony.

Reversed and remanded for retrial.

Prentice, J., concurred in part and dissented in part and filed opinion.

1. Criminal Law 1144.15

When jury has been instructed to consider evidence on no other issue except impeachment, Supreme Court will assume that jury followed the instructions.

2. Criminal Law 1134(2)

Evidence elicited from witness could not be considered in reviewing question whether evidence was sufficient to support guilty verdict where statements were admitted by trial court for limited purpose of attempting to impeach or inpugn veracity of truthfulness of the witness and for no other purpose.

3. Criminal Law 192

Double jeopardy did not bar second prosecution, even though Supreme Court reversed original conviction on basis of insufficiency of evidence, where case, as presented at trial, would have been sufficient to support guilty verdict except for limitation on use of witness' prior testimony. U.S.C.A. Const. Amend. 5.

Terry C. Gray, Gary, for appellant.

Theodore L. Sendak, Atty. Gen., Palmer K. Ward, Deputy Atty. Gen., Indianapolis, for appellee.

DeBRULER, Justice.

This is a direct appeal by Dirk Webster from his conviction by a Lake County Superior Court jury on two counts of murder (Ind. Code. §35-42-1-1[1]). Webster was sentenced to consecutive forty-five year terms on each count.

The appellant presents nine issues for review, but because of our disposition of this case we only discuss one claim — that the evidence presented by the State was insufficient to support a finding of guilt beyond a reasonable doubt.

The uncontroverted evidence against the defendant which was properly before the jury is set out below.

Betty DeBowles was last seen on December 16, 1977, and was found dead two days later in a car registered to Robin Thomas. Two spent bullets were found in the car. DeBowles died from a bullet wound to the brain. The bullet removed from DeBowles' brain during the autopsy was a .32 caliber bullet. State's Exhibits 1 through 5 were photographs of DeBowles' body, the car in which it was found, and a bullet hole inside the car; State's Exhibits 6 and 7 were the bullets recovered from the car.

Robin Thomas was last seen on December 16, 1977. A passer-by discovered his body in a drainage ditch and also found a gun nearby on April 9, 1978.

Photographs of the drainage ditch in which Thomas' body was found, and a photograph of the body were introduced into evidence. The gun was also admitted over objection as State's Exhibit 10, subject to being connected to the defendant, Webster, by later evidence.

Thomas died from drowning or exposure. Lacerations on his body would not have been fatal alone.

The jury heard the testimony of a firearms expert who had examined the bullets found in the car in which DeBowles' body was found and Exhibit 10, the gun found near Thomas' body. He testified that neither bullet was fired from the gun, and that each bullet came from a separate gun.

A second firearms expert told the jury that he had examined the bullet removed from DeBowles' brain but that because the bullet was mutilated, he could not determine whether it came from Exhibit 10.

Aurelius James Allen testified that he had been indicted for the two murders and that he knew the defendant. He said that he had entered into a written plea bargain arrangement under which, in return for his plea of guilty and his promise to testify against Garland Hicks, who had also been indicted for the murders, he received two six-year terms for involuntary manslaughter, and one six-year term for a robbery, and another robbery charge was dismissed. He also agreed during direct examination that at his guilty plea hearing, the judge told him that he was also to testify against Dirk Webster, and O.D. Webster, the fourth man indicted for the two murders.

The jury heard Allen testify that he had received a letter, later admitted over objection as State's Exhibit 11, while he was in jail on these charges, and that he had turned this letter over to the prosecutor. The letter reads:

> "Hey, Rap, I read of your unfortunate situation. So, I have to write and see if you're still cool. We both know what happended to Pee Wee. So don't let those Honkies make a snitch out of you. Vette's life was spared, because we was cool. But Harpo felt different. Also, let me remind you of this. The Pigs figure you and Vette were up on this from Jump. So, if you decide to flip, the weight can be shifted once again. If you try and jam us, you'll only jam yourself or Vette. And that's your main concern; isn't it."

He was asked if he recognized the handwriting on the letter and he said that he did not recognize it. In response to the prosecutor's questions regarding a prior statement in which he had purportedly identified the handwriting as that of Dirk Webster, Allen answered that he did not remember making the earlier statement. The jury also heard him testify that he did not remember having made statements about the murders at his guilty plea hearings and on other occasions before this trial.

The jury heard other evidence in connection with Allen's earlier statements, which we will discuss later.

A Lake County policeman testified that he had booked Webster on December 13, 1979, and a booking card bearing his signature was admitted into evidence. The jury heard the testimony of a handwriting expert who was asked to examine the handwriting on Exhibit 11 to determine if it was the same as the handwriting in Webster's booking card signature, and he testified that he was unable to form a judgment based on the samples. The trial judge, upon the stipulation of both parties, informed the jury that he had ordered the defendant to submit a handwriting exemplar for the purpose of comparing it with State's Exhibit 11, and that Webster had refused to comply with the order.

This was the substantive evidence which the jury could consider in determining the guilt of Dirk Webster.

We have said many times in reviewing sufficiency claims that we will not usurp the jury's function of weighing the evidence and judging the credibility of witnesses. We will only examine the evidence and reasonable inferences to be made therefrom that support the verdict. If there is evidence of probative value from which the jury could conclude that the defendant was guilty beyond a reasonable doubt, we will not disturb the verdict; conversely, if there is no such evidence of probative value in the record, we have not only the power and authority, but the solemn duty to set aside the verdict. *Osbon v. State*, (1938) 213 Ind. 413, 13

N.E.2d 223; *Taylor v. State*, (1973) 260 Ind. 64, 291 N.E.2d 890.

Having reviewed the sufficiency claim in this light, we must conclude that the substantive evidence which the jury could consider does not support a conclusion of guilt.

The most that the jury could have concluded is that DeBowles was shot to death and Thomas died of drowning and exposure; and that witness Allen was involved in the murders. The gun, Exhibit 10, was not connected to Webster by any substantive evidence. Even if we could infer that the jury made the deduction from Webster's refusal to furnish the handwriting exemplar that he indeed wrote the letter to Allen, this conclusion could do no more than raise a remote suspicion that Webster was involved. A mere suspicion or possibility of guilt, we have said many times, falls far short of satisfying the State's burden of proving guilt beyond a reasonable doubt. *Easton v. State*, (1967) 248 Ind. 338, 228 N.E.2d 6; *Floyd v. State*, (1980) Ind. App., 399 N.E.2d 449.

The State contends that there is additional evidence beyond that recited above, which serves to support the verdict of guilty. The State points out that the jury also heard in the course of the direct examination of the witness Aurelius Allen, earlier testimony which he had given in the course of his own guilty plea hearing, the bail hearing of O.D. Webster, and the trial of Garland Hicks. This testimony was read to the jury by the prosecution, initially to refresh Allen's recollection, and then to impeach him when he surprised the prosecution by stating that he did not remember the earlier testimony. It amounted to a detailed description of the events leading up to the murders, and the murders themselves, including the statements that appellant shot DeBowles three times, and helped Garland Hicks drown Thomas.

If the jurors had been permitted to consider Allen's prior testimony as substantive evidence, and if the jurors had

believed it, they could have concluded beyond a reasonable doubt that Webster had participated in the murders. If the jurors had been permitted the use of that prior testimony as substantive evidence, the avenue would be open to this Court to consider it as evidence supporting the verdict in resolving the sufficiency issue on appeal. However, the jurors were expressly precluded from considering that earlier testimony as substantive evidence by the following instruction:

> "During the course of this trial, certain questions were propounded to witness, Aurelius James Allen, by the Prosecutor regarding prior inconsistent statements allegedly made by him to which he almost always answered 'I don't remember.' The questions so propounded were not evidence and are not to be considered by you as evidence. Subsequent, the Prosecutors were permitted to read into evidence statements that were agreed by the parties to have been made by the witness, Aurelius James Allen, prior to this trial. The statements were admitted by the Court for limited purpose of attempting to impeach or impugn the veracity of truthfulness of that witness and for no other purpose. They may not be considered by you as evidence against the Defendant, Dirk Webster, who was not present when the statements were made, and was denied meaningful cross examination of the witness during the course of this trial."

[1,2] On appeal, this Court must presume that the jury obeyed the trial court's instructions in reaching its verdict. *Tyson v. State*, (1979) Ind., 386 N.E.2d 1185. When a jury has been instructed to consider evidence on no other issue except impeachment, we will assume that the jury followed the instructions. *Brown v. State*, (1964) 245 Ind. 604, 201 N.E.2d 281. Moreover, in reviewing sufficiency claims, we must exclude from our consideration any evidence that was introduced to impeach the credibility of a witness. Such evidence is not a part of the substantive case. *Golver v. State*,

(1970) 253 Ind. 536, 255 N.E.2d 657, 658, citing *McAdams v. State* (1948) 226 Ind. 403, 81 N.E.2d 671. See also, *Sickles v. Greybar*, (3rd Cir. 1955) 219 F.2d 847, *cert. den.*, 350 U.S. 827, 76 S.Ct. 57, 100 L.Ed. 739, *reh. den.*, 350 U.S. 905, 76 S.Ct. 176, 100 L.Ed. 794, and cases cited therein. Consequently, Allen's prior testimony is not, as contended by the State, additional evidence which may be considered by this Court as supporting the verdict of guilty.

[3] We therefore, reverse the conviction, and conclude that there is justification for retrial in this case. In the typical case of a reversal based on the insufficiency of the evidence, the double jeopardy clause of the Fifth Amendment, applicable to the states by the Fourteenth Amendment, requires a discharge of the defendant. *Burks v. United States*, (1978) 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1. This case is distinguishable from *Burks*, however. In that case, the defendant's conviction for robbery following a trial in which he had raised the defense of insanity was reversed by the Sixth Circuit Court of Appeals because the government had not met its burden of proving sanity beyond a reasonable doubt. The Court of Appeals remanded the case to the district court where the defendant was to have "a directed verdict of acquittal unless the government presents sufficient evidence to carry its burden on the issue of defendant's sanity." *Id.* at 2144. The United States Supreme Court reversed this aspect of the case, holding that a second trial is precluded once a reviewing court has found the evidence legally insufficient and that the only remedy available to a reviewing court is a direction of a judgment of acquittal. The underlying rationale for this approach is that the prosecution "has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury." (Original emphasis.) *Id.* at 2150, 2151.

In the present case we cannot say that the State's case was lacking in this sense. This case, as presented at trial, would

have been sufficient, if believed by the jury, except for the limitation on the use of Allen's prior testimony. That limitation arose when the trial judge determined that he would give the final instruction restricting the jury's use of that testimony. Up to that point in time the prosecution would have been warranted to a reasonable degree of legal certainty in believing that this evidence would come in as part of the substantive case against appellant Webster under the ruling in *Patterson v. State*, (1975) 263 Ind. 55, 324 N.E.2d 482, and *Stone v. State* (1978) Ind., 377 N.E.2d 1372. Cf. *Torrence v. State*, (1975) 263 Ind. 202, 328 N.E.2d 214. It was the trial judge's decision to give the restrictive final instruction which in fact and in point of time rendered the prosecution's case insufficient to convict. If that ruling had been made earlier the prosecution would have had an opportunity at the trial to offer other available proof to bolster its case.

Since we do not believe that the *Burks* rationale applies here, we order retrial.

GIVAN C.J., and HUNTER and PIVARNIK, JJ., concur.

PRENTICE, J., dissents with opinion.

PRENTICE, Justice, concurring and dissenting.

I am in agreement with the majority holding reversing the judgment. However, I do not agree that the appellant can be retried, consistently with the proscription of *Burks v. United States*, (1978) 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1. It is the viewpoint of the majority that, but for the lateness of the admonition limiting the application of Allen's prior testimony, the State may have presented additional incriminating evidence and that it was, therefore, somehow denied a fair opportunity to offer its best evidence. The same could as well be said under innumerable circumstances where the verdict was an acquittal. Certainly when the State's best, and perhaps its only evidence of guilt is excluded by the court, when

tendered, the State has been denied its opportunity. If that exclusion was error, the denial has been unfair, in the sense that it was not according to the rules. Nevertheless, the acquitted defendant cannot be retried-even though the ruling excluding the evidence be later reversed as a reversed question. I do not believe that the *Burks* opinion permits speculation as to why sufficient substantive evidence was not presented or upon what additional evidence might be forthcoming if the prosecution is given another try. Rather, it is my opinion that the rationale behind the double jeopardy proscription is simply that, considering the resources available to the State and the grave injustice done one who is erroneously brought to trial, it behooves the State to prosecute only upon firm evidence and then to bring forth its best case or suffer the consequences. Accordingly, I would order an acquittal in this case.

Dirk WEBSTER, Appellant,

v.

STATE of Indiana, Appellee.

No. 1281S350.

Supreme Court of Indiana.

Dec. 14, 1982.

Following reversal of defendant's original conviction and remand, 413 N.E.2d 898, defendant was again convicted before the Lake Superior Court, James E. Clement, J., of murder, and he appealed. The Supreme Court, DeBruler, J., held that: (1) double jeopardy did not bar defendant's retrial, even though defendant's original conviction had been reversed on the basis of insufficiency of evidence, since the case, as presented at original trial, would have been sufficient to support guilty verdict except for limitation on use of witness' prior testimony, and (2) evidence sustained conviction.

Affirmed.

Prentice, J., dissented.

1. Criminal Law 193

Double jeopardy did not bar defendant's retrial, even though defendant's original conviction had been reversed on the basis of insufficiency of evidence, since the case, as presented at original trial, would have been sufficient to support guilty verdict except for limitation on use of witness" prior testimony. U.S.C.A. Const. Amend. 5.

2. Criminal Law 1144.13 (6), 1159.2(7, 9), 1159.4(1)

In reviewing a claiming of insufficiency of evidence, Supreme Court does not weigh the evidence or resolve questions of credibility, but only looks to the evidence and reasonable inferences therefrom which support the verdict; if from that viewpoint there was evidence of

probative value from which reasonable trier of fact could conclude that defendant was guilty beyond reasonable doubt, conviction will be affirmed.

3. Homicide 250

Evidence in prosecution for murder sustained conviction.

Terry C. Gray, Gary, for appellant.

Linley E. Pearson, Atty. Gen., Palmer K. Ward, Deputy Atty. Gen., Indianapolis, for appellee.

DeBRULER, Justice.

Defendant-appellant, Dirk Webster, was originally charged with and convicted of two counts of murder, Ind. Code §35-42-1-1(1) (Burns 1979 Repl.), and was sentenced to serve two consecutive forty-five year terms of imprisonment. Following an appeal to this Court, defendant's conviction was reversed, and a new trial was ordered. *Webster v. State*, (1980) Ind., 413 N.E.2d 898 (Prentice, J., dissenting). Defendant was again convicted upon retrial, and the same sentence was imposed. In this appeal, defendant contends that the retrial was barred by the double jeopardy clause of the Fifth Amendment to the United States Constitution and of Article 1, §14 of the Indiana Constitution. He also urges that there was not sufficient credible evidence to support the verdict rendered here.

[1] The question of whether defendant's retrial was prohibited by the double jeopardy clause has already been considered, discussed and decided adversely to defendant's claim in this case on its initial appeal. We said there that while in the usual case a reversal for evidentiary insufficiency precludes a retrial because of double jeopardy considerations, *Burks v. United States*, (1978) 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, the *Burks* rationale does

not apply in this case. *Webster, supra*, 413 N.E.2d at 902. Although the State may not appeal from an acquittal of a defendant by the trier of fact, no matter how erroneous the foundation for that acquittal, *Fong Foo v. United States*, (1962) 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629, here, a judgment of conviction was rendered by the jury in defendant's first trial. The question of whether the State had "one fair opportunity to offer whatever proof it could assemble", *Burks, supra*, 437 U.S. at 16, 98 S.Ct. at 2150, 57 L.Ed.2d at 12, may be considered when a judgment of conviction has been returned and defendant appeals, alleging evidentiary insufficiency, and attempts to avoid retrial.

Prior to defendant's retrial, he filed a motion to dismiss based on the double jeopardy claim. At a hearing on that motion, the trial judge denied such relief, determining that he should conduct the retrial we had ordered. The denial of the motion was not error.

Defendant also claims that the State did not present credible witnesses whose testimony could be believed beyond a reasonable doubt, and therefore there was insufficient evidence to support the jury's verdict. He argues that Aurelius James Allen, an accomplice who testified and described defendant's participation in the murders, impeached his own credibility and was not a believable witness. The determination of a witness's credibility, however, is for the jury. *Taylor v. State*, (1981) Ind., 425 N.E.2d 141.

[2, 3] In reviewing a claim of insufficient evidence, this Court does not weigh the evidence or resolve questions of credibility, but only looks to the evidence and reasonable inferences therefrom which support the verdict. *Smith v. State*, (1970) 254 Ind. 401, 260 N.E.2d 558. If from that viewpoint there was evidence of probative value from which a reasonable trier of fact could conclude that a defendant was guilty beyond a reasonable doubt, we will affirm the conviction. *Taylor v. State*, (1973) 260 Ind. 64,

291 N.E.2d 890; *Glover v. State*, (1970) 253 Ind. 536, 255 N.E.2d 657. Allen testified directly about the defendant's participation in the murders of Betty DeBowles and Robin Thomas and detailed the events surrounding these crimes. The jurors could have concluded beyond a reasonable doubt from this and other evidence that the defendant was guilty.

The conviction is affirmed.

GIVAN, C.J., and HUNTER and PIVARNIK, JJ., concur.

PRENTICE, J., dissents.